89-691
No. 89-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SCOTT C. TYLER, individually; SHEILA LYNN TYLER; DEBRA DENISE TYLER; JENELLE LORRAINE TYLER, by Scott C. Tyler, her father and next friend; BRYAN KENT TYLER, by Scott C. Tyler, his father and next friend,

Petitioners,

—v.—

RICH BERODT; SANDRA BERODT; EVERETT HOWARD; SCOTT COUNTY, IOWA; FOREST ASHCRAFT, Scott County Sheriff,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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69pp

QUESTIONS PRESENTED

Acting as state agents, respondents monitored and recorded petitioners' conversations over a cordless telephone located within petitioners' home. No warrant was ever obtained for these eavesdropping activities, which lasted for months. The questions presented for review are:

1. Whether the court below erred in determining that cordless telephones, which are now used in millions of American homes, are entirely outside Fourth Amendment protection and can be monitored by the state without limitation?

2. Whether the court below erred in failing to recognize that petitioners' Fourth Amendment interest in the sanctity of their home was violated by the unregulated eavesdropping of respondents?

3. Whether the court below erred in holding that respondents' surreptitious

recording of petitioners' cordless telephone conversations was consistent with then-applicable provisions of the federal Wiretap Act, 18 U.S.C. §§2510-2520, and the federal Communications Act, 47 U.S.C. §605?

LIST OF PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported at 877 F.2d 705 (1989), and is reprinted in the appendix. (19a-28a). The Eighth Circuit's order denying the petition for rehearing and suggestion for rehearing en banc is unreported. (28a). The decision of the United States District Court for the Southern District of Iowa is also unreported. (9a-18a).

JURISDICTION

The district court's decision granting summary judgment for respondents was issued on May 18, 1988. On July 25, 1988, the district court issued a further ruling denying petitioners' motion for reargument, and for expansion of findings of fact, con-

clusions of law and alteration or amendment of judgment.

Petitioners filed a pro se notice of appeal on August 23, 1988. On June 15, 1989, the Eighth Circuit affirmed the judgment of the district court. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Eighth Circuit on August 8, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter the "Wiretap Act"), 18 U.S.C. §§2510-2521, was substantially amended in 1986. During the events at issue in this lawsuit, §2510 provided in relevant part:

> As used in this chapter --
>
> (1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception furnished or operated by . . . a common carrier

> . . . of interstate or foreign communications;
>
> (2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . .

Section 605 of the Communications Act of 1934, 47 U.S.C. §605 , provides in relevant part:

> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception . . . . No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication . . . for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio commu-

> nication . . . knowing that such communication was intercepted, shall divulge or publish . . . such communication . . . or use such communication . . . for his own benefit or for the benefit of another not entitled thereto . . . .

STATEMENT OF THE CASE

A. Factual Background

Petitioners received a cordless telephone as a gift in June 1983. The phone was popular with the entire Tyler family, which used it to conduct business, discuss politics, socialize with friends, and engage in spiritual counseling.[1/] By their activities and through their testimony, it is clear that petitioners regarded the cordless telephone as simply another extension phone within their home and used it accordingly.

1/ Deposition of Scott C. Tyler, December 23, 1987, at 40-43.

Approximately one year after receiving the cordless telephone, petitioners learned that their conversations with friends, relatives and business associates had been monitored and recorded at the direction of the Scott County Sheriff's Department.[2/] In total, the Sheriff's Office obtained between 20 and 30 cassettes containing recordings of conversations held over petitioners' cordless phone during the fall and winter of 1983.[3/] The eavesdropping and recording was conducted without any judicial authorization or supervision, (13a), in apparent violation of state law (7a). So far as the record reveals, the Scott

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2/ See n.1, supra, at 89.

3/ Deposition of Sandra Berodt, October 30, 1984, at 32-33. These conversations were recorded between September 1983 and December 1983. Id. at 13, 37. The Berodts continued to monitor petitioners' phone conversations, however, at least until February 1984. Id. at 38.

County Sheriff's Department had no guidelines that regulated or controlled this surveillance activity. Furthermore, there is no indication in the record that respondents made any effort to minimize the intrusion into petitioners' lives or those of the people they spoke to.

The eavesdropping began when respondents Sandra and Rich Berodt realized that their own cordless phone would make ringing or dialing noises whenever the Tylers, who lived several blocks away, received or placed a call. Intrigued, the Berodts began to listen in on petitioners' conversations. Initially, however, the Berodts were unable to hear these conversations clearly, due in part to interference from their own base unit.[4/] As a result, the

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4/ Over time, the Berodts learned how to monitor and record petitioners' phone conversations by (continued...)

Berodts misunderstood one of Scott Tyler's comments and mistakenly concluded that Mr. Tyler was involved in illegal narcotics activity.[5]

Based on this misimpression, the Berodts contacted respondent Everett Howard, an investigator with the Scott County Sheriff's Department. (11a-12a). Investigator Howard encouraged the Berodts to listen to as many of petitioners' conversations as they could. (12a). He also supplied the Berodts with recording equipment so that they could tape whatever conversations they overheard. (12a). The

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[4] (...continued)
unplugging their base unit and boosting the power switch on their remote handset. The record is somewhat ambiguous on whether they learned this on their own, or were instructed by the Scott County Sheriff's Department.

[5] See n.3, supra, at 12.

recorded tapes were then picked up "every day" by Inspector Howard.[6/]

It quickly became apparent that petitioners were not, in fact, engaged in illegal narcotics activity. Nevertheless, respondents continued to record petitioners' cordless telephone conversations for many additional months in the hope that some illegal activities would be uncovered. Ultimately, Scott Tyler was charged with criminal conspiracy and theft based on certain business arrangements that had been discussed over his cordless telephone. (21a).[7/]

Petitioners' cordless telephone is typical of millions of others now in use

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6/ See n.3, supra, at 21.

7/ See pp.11-12, infra. None of the other members of the Tyler family were charged with any unlawful conduct.

throughout the country. The speaker's voice is relayed from a mobile handset to a base unit through the use of low power radio transmissions. From the base unit, the signal is then transmitted through the regular telephone lines. In most cases, as here, both the mobile handset and the base unit are located in or near the home. The range of the initial radio transmission is therefore quite limited. For example, the Owner's Manual for petitioners' cordless telephone indicates that its ordinary range does not exceed 700 feet. (14a).[8/] The Manual also notes that the presence of another cordless phone within range and operating on the same frequency may result

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8/ The Tyler home was located more than 700 feet from the Berodt home. (11a). It is not clear from the record why petitioners' conversations carried farther than expected. It is clear that this technological anomaly was neither anticipated by the manufacturer nor expected by petitioners.

in interference with the user's line, which can then be minimized or avoided altogether by lowering the antenna. Petitioners never experienced such interference, which might at least have alerted them that their cordless phone conversations were subject to interception.[9/]

B. State Court Proceedings

Prior to his state court trial on theft and conspiracy charges, Scott Tyler moved to suppress the taped conversations that had been obtained by eavesdropping on his cordless telephone.[10/] That motion was granted by the state trial judge and never appealed by the state. (1a-8a).

9/ The Berodts were careful to conceal their eavesdropping activity from petitioners and others in order to avoid detection. See n.3, supra, at 24-25, 36.

10/ Mr. Tyler was ultimately convicted on these charges.

The trial judge appears to have based her ruling on three alternative grounds: first, that petitioners' cordless telephone conversations were "wire communications" protected by the federal Wiretap Act (4a-5a); second, that petitioners' cordless telephone conversations were oral communications entitled to an expectation of privacy under the federal Wiretap Act (5a-6a); and third, that the surreptitious recording of petitioners' conversations by state officials in this case violated state law (7a).

These legal conclusions were supported by two pertinent observations. As the trial judge explained (4a-5a):

> We're not talking here about land-mobile communications where one taxicab is -- or one mobile vehicle is transmitting to another mobile vehicle. We're not even talking about land-mobile communications where one base would be transmitting to a number of mobile units via radio or we're not

> talking about a CB. We're talking about a cordless telephone marketed for residential use.

In a similar vein, the trial court also noted (6a):

> Once again, we're not talking about a situation . . . where you've got ship-to-shore radio -- [a] marine radio system where you make a telephone call on a boat in the middle of the Atlantic and you anticipate that anybody else could be listening in on your telephone conversation. This was a conversation that was intended to be private. It was made on a telephone. And although, indeed, it is technically a radio, it is not marketed as a radio. It's marketed as a telephone which utilizes radio frequencies which connect to the telephone networking system.

C. Proceedings Below

This action was commenced under 42 U.S.C. §1983 in the Southern District of Iowa alleging that respondents' eavesdropping and recording of petitioners' cordless telephone conversations violated the Fourth Amendment, the federal Wiretap Act, 18 U.S.C. §§2510-2520, and the federal Commu-

nications Act, 47 U.S.C. §605. Each of these claims was rejected by the district court in granting respondents' motion for summary judgment.

The district court opinion begins by reciting the language of the Wiretap Act, which defines a protected "wire" communication as "any communication made in whole or in part . . . by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . ." 18 U.S.C. §2510(1). The court then summarily concluded that the "intercepted communications in this case were not 'wire' communications within the meaning of the [Act]," despite the fact that they were clearly transmitted, at least in part, over traditional telephone lines. (15a). As support for this proposition, the district court relied entirely on Edwards v.

Bardwell, 632 F.Supp. 584 (M.D.La.), aff'd, 808 F.2d 54 (5th Cir. 1986). The court acknowledged, but declined to follow, the contrary authority of the Ninth Circuit in United States v. Hall, 488 F.2d 193 (9th Cir. 1973).

Citing Edwards again, the district court next concluded that petitioners' recorded conversations were not "oral" communications within the meaning of the Wiretap Act, 18 U.S.C. §2510(2), apparently on the ground that the technology of cordless telephones "did not justify any expectation by [petitioners] that their conversations would not be subject to interception." (16a). Lastly, petitioners' Fourth Amendment claim was rejected in a single sentence, which did not even mention, let alone weigh, the scope and duration of

respondents' eavesdropping in this case. (16a).

On appeal, the Eighth Circuit affirmed in a per curiam opinion that dismisses any privacy interest in cordless telephones, no matter how extensive or intrusive the government's eavesdropping may be. (25a-27a). In reaching this conclusion, the Eighth Circuit noted and endorsed what it described as the "emerging view" of the lower courts regarding cordless telephones. (24a). It did not engage in any independent analysis of the constitutional or statutory issues in this case.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES UNRESOLVED ISSUES OF NATIONAL SIGNIFICANCE THAT AFFECT THE PRIVACY RIGHTS OF MILLIONS OF AMERICANS

According to published industry figures, approximately 18.7 million cord-

less telephones have been sold in this country during the past 3 years and approximately 23% of all American homes now have cordless phones. Moreover, these numbers are increasing. The projected sales for 1989 are 9.2 million; the projected sales for 1990 are 10 million.[11/] The privacy rights of each of these cordless telephone users are jeopardized by the decision below.

The issue is not whether cordless telephones employ a different technology than the traditional phone; obviously they do. The issue is whether that fact, and that fact alone, is sufficient to remove all Fourth Amendment protection for the daily communications of millions of people who

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11/ See "Consumer Electronics -- U.S. Sales," at 16, 24, published by Electronic Industries Association Consumer Electronics Group (June 1989).

make ordinary use of cordless phones within their homes.

Americans justifiably expect privacy in their residential phone conversations. That expectation is not based on faith in technology but on faith in our constitutional system. If the rule is to be otherwise, the American people should clearly be told by this Nation's highest court that the cost of participation in an age of electronic communication may well include the loss of widely accepted constitutional rights.

Petitioners do not dispute that the constitutional protection that would normally attach to private conversations within the home can be waived if those conversations are indiscriminately broadcast to the outside world. However, that is hardly the case here. Unlike a trucker

using his CB or a ham radio operator, petitioners dialed a specific number to talk to a specific person each time they used their cordless telephone. As the state trial court recognized in granting Scott Tyler's motion to suppress, these conversations were "intended to be private." (6a). Moreover, it is important to emphasize that the radio transmissions at issue in this case are extremely weak. For all intents and purposes, they are designed to travel from the backyard to the kitchen, which is how they were used by petitioners and are used by most people.

In addition, the decision below effectively ignores the privacy interest of those millions of Americans who receive cordless telephone calls. They have not even arguably waived their privacy rights by using a new technology. In most

instances, they have simply picked up the receiver in their home or office without any way of knowing whether the caller on the other end is using a cordless telephone. Under these circumstances, there is no particular reason why they should be "on notice" that their conversations may be overheard.12/

Petitioners do not contend that the technology of cordless telephones is irrelevant to Fourth Amendment analysis. As Congress has recognized, cordless telephone conversations are more susceptible to casual interception than traditional tele-

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12/ The Eighth Circuit acknowledged the substantial privacy interests of "persons using a standard telephone to speak to a cordless telephone," (26a, n.2), but refused to provide such persons with any constitutional protection against unreasonable search or seizure.

phone calls.[13/] But, contrary to the view of the Eighth Circuit, that fact does not justify ignoring the Fourth Amendment entirely any more than crossed telephone wires short-circuit all Fourth Amendment safeguards. To the extent that this represents the "emerging" consensus of the lower courts, plenary review by this Court is even more essential.

13/ In 1986, the definitional section of a "wire communication" in the Wiretap Act, 18 U.S.C. §2510(1), was amended to exempt "the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit." Pub.L. No. 99-508, §101(a)(1)(D). See also S.Rep. No. 99-541 at 9, 12, 99th Cong., 2d Sess., reprinted in 1986 U.S. Cong. & Adm. News 3563, 3566. The reason for this change appears to have been a congressional desire to insulate private citizens from criminal liability for the inadvertent interception of other cordless phone conversations on their own cordless phone. As a factual matter, this case presents a very different scenario. As a legal matter, the 1986 amendments were not in effect when petitioners' conversations were recorded nor do they govern the constitutional question in this case.

The search for an "emerging" consensus is not, in any event, a substitute for constitutional analysis. This is particularly true in Fourth Amendment cases. Otherwise, the individual's claim to a reasonable expectation of privacy could always be defeated by the government's repeated announcement that no privacy exists. See Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979).

Indeed, the decision below evokes an uncanny echo of this Court's discredited opinion in Olmstead v. United States, 277 U.S. 438 (1928).[14/] In refusing to apply the Fourth Amendment to telephone wiretaps, the Olmstead majority wrote:

14/ "The Olmstead decision caused such widespread dissatisfaction that Congress in effect overruled it by enacting §605 of the federal Communications Act, which made wiretapping a federal crime." Lopez v. United States, 373 U.S. 427, 462 (1963).

> The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the 4th Amendment.

Id. at 466.

Justice Brandeis dissented in a famous opinion that has since been vindicated by history and constitutional doctrine. Arguing against an overly restrictive interpretation of the Fourth Amendment, he warned:

> Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

Id. at 473.

Forty years later, in Katz v. United States, 389 U.S. 347 (1967), this Court agreed that the personal nature and funda-

mental importance of telephone communications required Fourth Amendment protection despite the technological vulnerability of such communications to interception. Like Katz, the present case demands that a judicial balance be struck between developing technology and the enduring values of the Fourth Amendment. Petitioners respectfully submit that this Court should strike that balance itself when the privacy rights of millions of Americans can be affected by the result.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The decision below conflicts with the rationale of at least four significant decisions by this Court, which were never cited or distinguished by the Eighth Circuit. The unifying theme of these overlooked decisions is the importance of con-

text in Fourth Amendment analysis. Unlike the Eighth Circuit, this Court has consistently recognized that the scope and duration of government surveillance are important considerations in any Fourth Amendment case. The decision below thus represents a fundamental distortion of this Court's Fourth Amendment law.

In Berger v. New York, 388 U.S. 41, 59 (1967), this Court struck down the use of an electronic eavesdropping device because the warrant that purported to authorize it did not meet the specificity requirements of the Fourth Amendment (as to either time or place) and thus left "too much to the discretion of the officer executing the order." Here, there was no judicial order of any sort and the discretion of the Sheriff's Department was entirely unrestrained. The threat that this poses to

personal privacy was cogently expressed in Justice Clark's majority opinion:

> Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certainly and -- what is more important -- without attending illegality.

Id. at 63.

In Lee v. Florida, 392 U.S. 378 (1968), this Court expressly rejected the government's contention that the existence of a telephone party line defeats any privacy claim under the federal Communications Act, 47 U.S.C. §605. As the Court noted: "A party-line user's privacy is obviously vulnerable, but it does not necessarily follow that his telephone conversations are

completely unprotected by §605." 392 U.S. at 381 n.5.[15/]

That principle is hardly an extreme or surprising one. Police surveillance is different than the unavoidable compromises with privacy that all of us must make in an increasingly congested environment, and sustained police surveillance of the sort revealed by this record and condemned by Lee is undeniably different than the occasional excesses of an overinquisitive neighbor. By merging the two, the Eighth Circuit ignored both common sense and this Court's jurisprudence regarding the privacy of phone conversations. E.g., Katz, supra.

In United States v. Karo, 468 U.S. 705 (1984), the Court reiterated its long-

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15/ Section 605 is at issue in this case as well. Moreover, the interpretation of §605 is essentially congruent with the Fourth Amendment. (27a).

standing view that the home represents a special sanctuary for Fourth Amendment purposes. On that basis, the Court distinguished between the government's placement of an electronic beeper on the defendant's automobile, which the Fourth Amendment allows, and the government's monitoring of an electronic beeper in the defendant's home, which the Fourth Amendment prohibits. This case, of course, involves an even more substantial intrusion into petitioners' home.

Finally, in Florida v. Riley, 488 U.S. ___, 102 L.Ed.2d 835 (1989), Justice O'Connor's concurring opinion (which provided the fifth vote for the majority) engaged in precisely the sort of nuanced analysis that is entirely lacking in the all-or-nothing approach of the decision below. In considering whether the police

were entitled to search for marijuana from a police helicopter flying over defendant's property at a height of 400 feet, Justice O'Connor wrote:

> If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.

102 L.Ed.2d at 845.[16/]

In contrast to Justice O'Connor's approach, the court below considered only

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16/ Based on the record in Riley, Justice O'Connor concluded that the defendant's expectation of privacy from aerial surveillance at 400 feet was not a reasonable one. At the same time, she cautioned that "public use of altitudes lower than that -- particularly public observations from helicopters circling over the curtilage of a home -- may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations." Id. at 845.

whether the technological capacity exists to intercept petitioners' cordless telephone conversations. It never considered how widespread that capacity is, or the frequency with which it is exercised. Indeed, petitioners' attempt to raise these factual questions in their opposition to respondents' motion for summary judgment was rebuffed by the lower courts. Yet, absent this inquiry, it is impossible to assess whether petitioners' expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" Katz, 389 U.S. at 361.

These analytic errors were fatal to petitioners' case. Their impact, however, goes far beyond these particular litigants. In short, this case illustrates again the recurring tension between technology and privacy in modern society. As in the past,

when similar conflicts have arisen, review by this Court is both necessary and proper to set the appropriate constitutional boundaries.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be granted in this case.

Respectfully submitted,

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Dated: October 26, 1989

APPENDIX

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

STATE OF IOWA,	)	
	)	CRIM. NO. 116587-01
Plaintiff,	)	CRIM. NO. 116587-02
	)	CRIM. NO. 116587-03
vs.	)	
	)	TRANSCRIPT OF
SCOTT CORLEY TYLER,	)	COURT'S RULING ON
LEVI LLOYD BRANNAM,	)	MOTION TO DISMISS
Jr, SYBIL BRANNAM,	)	
	)	
Defendants.	)	

The above-entitled matter came on before the Honorable Linda K. Neuman at the Scott County Courthouse, Davenport, Iowa, on the 8th day of November, 1984, at approximately 2:10 p.m.

APPEARANCES

ATTORNEY JAMES L. OTTESEN, Assistant Scott County Attorney, 416 West Fourth Street, Davenport, Iowa, on behalf of the STATE.

ATTORNEY KENT A. SIMMONS, 200 Union Arcade Building, Davenport, Iowa, on behalf of DEFENDANT LEVI BRANNAM.

ATTORNEY DAVID G. BINEGAR, 326 West Third Street, Davenport, Iowa, on behalf of DEFENDANT SYBIL BRANNAM.

Sheila L. Lasley
Official Shorthand Reporter
Scott County Courthouse
Davenport, Iowa 52801

Transcript ordered: January 21, 1986
Transcript delivered: January 27, 1986

(WHEREUPON, the following proceedings were had in chambers.)

THE COURT: This is Criminal Cause No. 16587-01, 116587-02, 16587-03, The State of Iowa v. Scott Corley Tyler, Levi Brannam and Sybil Brannam. Before the Court are Assistant County Attorney James Ottesen appearing on behalf of the State and attorneys Kent Simmons and Dave Binegar representing the Defendants, with the per-

mission of Randy Hohenadel who is presently on trial.

The Court has pending before it a Motion to Suppress filed on behalf of all of the Defendants. Having considered both the oral and written arguments of counsel and the testimony presented in support of that Motion to Suppress, the Court is prepared to rule as follows:

Clearly Title 3 of the Crime Control Act of 1968, which is found at 18 U.S.C. Section 2510, et.seq., controls this matter. Under this Act the Court -- let me go back. Based on the Court's review of the Crime Control Act and the case authority presented by counsel, this Court determines that the tape recordings prepared by Mrs. Berodt at the instigation of the Scott County Sheriff's Department were illegally obtained and, accordingly, should

be suppressed. Basically, the Court would find these tapes subject to suppression on one of two theories. First of all, that the communications which were taped were in fact wire communications as defined under the Crime Control Act.

This Court recognizes that it is taking a position contrary to the Court in State v. Howard but consistent with the Court in State v. Hall. I disagree with the Court in State v. Howard. That's a Kansas case and the -- Kansas Supreme Court case and certainly not controlling here -- well, let me go back.

That in order for the intended communication to take place here, that it was necessary that there be a land-line wire communication. We're not talking here about land-mobile communications where one taxicab is -- or one mobile vehicle is

transmitting to another mobile vehicle. We're not even talking about land-mobile communications where one base would be transmitting to a number of mobile units via radio or we're not talking about a CB. We're talking about a cordless telephone marketed for residential use.

And under the facts of this case, although Scott Tyler -- Defendant Scott Tyler may have been using a cordless telephone, the persons with whom he was communicating were the other Defendants in this case, and by their own testimony and based on the other evidence before the Court, they were communicating with him on a conventional telephone using land lines.

Secondly, even if one were to disagree that this cordless phone by its definition is a wireless piece of communications equipment and hence what we have here is an

oral communication as that is defined under the Crime Control Act, this Court is of the opinion that the tapes should still be suppressed as a violation of these Defendants' right to privacy. Once again, we're not talking about a situation as discussed in both Hall and Howard where you've got a ship-to-shore radio -- marine radio system where you make a telephone call on a boat in the middle of the Atlantic and you anticipate that anybody else could be listening in on your conversation. This was a conversation that was intended to be private. It was made on a telephone. And although, indeed, it is technically a radio, it is not marketed as a radio. It's marketed as a telephone which utilizes radio frequencies which connect to the telephone networking system.

This Court further finds that the activity of the agencies of the State here in -- in requesting that these conversations be taped, is also in contravention of Section 727.8 of the 1983 Code of Iowa. It appears to this Court that Mrs. Berodt was not in violation of Section 2511 by receiving the communication which was transmitted by radio, but the code section strictly prohibits recording such messages or communications because she was not in fact a party to the communication. She was simply an eavesdropper. The communication was not intended for her whatsoever.

Clearly, the State should have obtained authority to -- and permission of the Court -- to tape these communications, and having failed to do that, the communications -- the tape recordings that were

obtained will be suppressed and not allowed to be admitted into evidence in this case.

I think that's all.

(WHEREUPON, the Court's Ruling on the Motion to Suppress concluded.)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

SCOTT C. TYLER, et al.,	*	CIVIL NO. 85-186-D-2
Plaintiffs,	*	RULING GRANTING MOTIONS FOR SUMMARY
v.	*	JUDGMENT, ORDER FOR FINAL JUDGMENT, AND
RICH BERODT, et al.,	*	ORDER POSTPONING TRIAL OF COUNTER-CLAIMS
Defendants.	*	

Defendants' motions for summary judgment and plaintiffs' combined resistance to the motions are before the court.

Plaintiffs complain that defendants violated 18 U.S.C. § 2511, 47 U.S.C. § 605 and the Fourth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, by intentionally intercepting, divulging and using plaintiffs' cordless telephone con-

versations. They sue under 18 U.S.C. § 2520, 47 U.S.C. § 605 and 42 U.S.C. § 1983.

FACTS

The factual essence of plaintiffs' complaint is that defendants Berodt began intercepting portions of conversations taking place on plaintiffs' cordless telephone; that based on what they heard they suspected plaintiff Scott C. Tyler of being involved in illegal activities; that they contacted defendant Howard, an investigator in the Scott County Sheriff's Department; that Howard encouraged the Berodts to listen to more of the Tyler cordless phone conversations, supplied them with Scott County Sheriff Department recording equipment and instructed them on how to use it; and that more of the cordless phone conversations were intercepted and divulged.

There are some disputed facts, but they are not material. The allegations of plaintiffs recited in the preceding paragraph are assumed, for purposes of the motions, to be true, and the following facts are established as undisputed:[1/]

(1) The residence of the defendants Berodt was located approximately 4 1/2 blocks away from the residence of the plaintiffs, a distance in excess of 700 feet.

(2) The Berodts made contact with defendant Howard, an investigator in the criminal investigations department of the

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1/ These undisputed facts are established by stipulated statement of undisputed facts filed February 8, 1988, defendants' statement of undisputed facts filed March 7, 1988, which was not disputed by plaintiffs (see Local Rule 2.2.7), and the Owner's Manual attached to the affidavit filed November 25, 1985.

Scott County Sheriff's Department, with reference to a conversation they overheard.

(3) At all times material Howard was acting in his capacity as a law enforcement officer. In that capacity he encouraged the Berodts to listen to as many conversations as they could, and he supplied them with equipment for the recording of telephone conversations.

(4) Defendant Ashcraft, as Sheriff of Scott County, has a duty to supervise employees and deputies and prevent them from violating the law and the rights of citizens; Howard was a deputy subject to supervision by the Sheriff.

(5) Each and all of the acts of public defendants were done by them not as individuals, but under the color of law, ordinances, regulations, customs and usages of the state of Iowa, Scott County and

under the authority of their office as policeman for such county.

(6) No warrant was obtained or requested to authorize the overhearing or recording of communications over the cordless telephone owned by the plaintiffs.

(7) Scott County, Iowa, the Scott County Sheriff, and the Sheriff's deputies and employees have a legal duty to investigate criminal offenses within the county and to faithfully uphold the criminal laws applicable to such jurisdiction.

(8) All communications overheard or taped by the defendants involved radio wave transmissions which emanated from a cordless telephone unit in the plaintiffs' residence.

(9) All such communications overheard or recorded by the defendants were broadcast to an ordinary cordless telephone unit

located in the residence of defendants Berodt.

(10) The plaintiffs' cordless telephone is regulated by the F.C.C. both as a telephone and a radio device.

(11) The Owner's Manual discloses that conversations on a cordless phone may be heard by one or another cordless phone in range (700 feet) and operating on the same frequency.

CONCLUSIONS OF LAW

The Federal Wiretap Law, 18 U.S.C. § 2511, prohibits the intentional interception or intentional use of "wire" or "oral" communications. "Wire communication" is defined by section 2510(1) as:

> any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or

> operating such facilities for the transmission of interstate or foreign communications; * * *.
>
> "Oral communication" is defined by section 2510(2) as:
>
> any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

The intercepted communications in this case were not "wire" communications within the meaning of the Federal Wiretap Law. Edwards v. Bardwell, 632 F. Supp. 584 (M.D. La. 1986), aff'd, 808 F.2d 54 (5th Cir. 1986)(per curiam unpublished opinion). I think the contrary case of United States v. Hall, 488 F.2d 193 (9th Cir. 1973), was wrongly decided.

The intercepted communications in this case were not "oral" communications within the meaning of the Federal Wiretap Law because the circumstances (use of cordless telephone with the potential for conversa-

tions on it being heard by others using cordless telephones) did not justify any expectation by plaintiffs that their conversations would not be subject to interception. Edwards v. Bardwell, supra.

The foregoing leads to the conclusion that the interceptions of the communications in this case did not violate 18 U.S.C. § 2511. The interceptions also did not violate 47 U.S.C. § 605. Edwards v. State Farm Ins. Co., 833 F.2d 535 (5th Cir. 1987). Because there was no justifiable expectation of privacy, the interceptions did not violate the Fourth Amendment.

The November 8, 1984, ruling of the Iowa District Court for Scott County in State of Iowa v. Scott Corley Tyler, et al., Criminal Nos. 116587-01, 116587-02, and 116587-03 is not issue preclusive against the defendants in this litigation.

RULING AND ORDERS

The defendants' motions for summary judgment are granted, and plaintiffs' amended complaint shall be dismissed with prejudice.

Defendants' counterclaims remain to be tried. However, pursuant to Fed. R. Civ. P. 54(b), this court determines that there is no just reason for delaying entry of judgment dismissing with prejudice plaintiffs' amended complaint, and IT IS ORDERED that final judgment dismissing with prejudice plaintiffs' amended complaint be entered immediately. Pursuant to Fed. R. Civ. P. 68 and the unaccepted offer of judgment filed on March 11, 1987, by defendants Howard, Scott County and Ashcraft, IT IS ORDERED that judgment be entered against the plaintiffs and in favor of defendants Howard, Scott County and

Ashcraft for all costs incurred after March 11, 1987.

IT IS FURTHER ORDERED that trial of the counterclaims is postponed. Trial of the counterclaims will be rescheduled after time for plaintiffs to appeal has expired or, if plaintiffs appeal, after the appeal has been decided.

DATED this 18th day of May, 1988.

/s/
HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2273

Scott C. Tyler, individually; Sheila Lynn Tyler; Debra Denise Tyler; Jenelle Lorraine Tyler, by Scott C. Tyler, her father and next friend; Bryan Kent Tyler, by Scott C. Tyler, his father and next friend,	*	Appeal from the United States District Court for the Southern District of Iowa
Appellants,	*	
v.	*	
Rich Berodt; Sandra Berodt; Everett Howard; Scott County, Iowa; Forest Ashcraft, Scott County Sheriff,	*	
Appellees.	*	

Submitted: May 9, 1989
Filed: June 15, 1989

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and and [sic] MAGILL, Circuit Judge.

PER CURIAM.

Scott C. Tyler and several members of his family appeal from the order of the

district court granting summary judgment against them on their claims against the private citizens and law enforcement officers who intercepted the Tylers' cordless telephone conversations. The district court rejected their claims under the fourth and fourteenth amendments, federal wiretap laws and 42 U.S.C. § 1983, and held that Title III of the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, § 802, 82 Stat. 212 (1968) (codified as amended at 18 U.S.C. §§ 2510-20 (982)) (Wiretap Act), did not prohibit interception of cordless telephone communications.[1] We affirm.

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[1] The Electronic Communications Privacy Act of 986 subsequently changed the definition of wire communications to provide that "such term does not include the radio portion of a cordless telephone [call] that is transmitted between the cordless telephone handset and the base unit." See Pub. L. No. 99-508, § 101(a), 100 Stat. 1848 (1986). The 1986 legislation was generally a comprehensive

(continued...)

FACTS

In 1983, Richard and Sandy Berodt discovered that their cordless telephone could intercept conversations on the cordless telephone in the Tyler household more than four blocks away. Based on what they overheard, the Berodts suspected Scott Tyler of criminal activity. They contacted the Scott County, Iowa, Sheriff's Department and were urged to monitor Tyler's conversations. No court order was obtained. After the Berodts made several tape recordings in this manner, criminal charges were filed against Tyler.

In his criminal trial, Tyler moved to suppress evidence of the conversations on

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1/ (...continued)
overhaul of federal wiretap law, rather than a clarification of pre-existing law. See S. Rep. No. 99-54, 99th Cong., 2d. Sess. 2-4, reprinted in 1986 U.S. Code Cong. & Admin. News 3555-3558.

the ground that the evidence was gathered in violation of the Wiretap Act. The trial court granted the motion to suppress, relying on United States v. Hall, 488 F.2d 193, 96-97 (9th Cir. 1973)(the exclusionary provisions of the Wiretap Act apply when at least one participant in a telephone conversation uses an ordinary line telephone).

On July 31, 1985, Tyler and four members of his family filed this civil suit against the Berodts, the county, and two law enforcement officers. The district court granted the defendants' motions for summary judgment. Rejecting the Hall analysis, the court followed Edwards v. Bardwell, 632 F. Supp. 584, 598 (M.D. La.) (Wiretap Act provides no protection against interception of cordless telephone transmissions), aff'd, 808 F.2d 54 (5th Cir. 1986)(table; unpublished per curiam) (No.

86-3310). The court also found that the state court decision on the issue did not preclude relitigation. This appeal followed.

DISCUSSION

Iowa rules of preclusion apply to this case. Allen v. McCurry, 449 U.S. 90, 96 (1980); 28 U.S.C. § 1738. The Berodts and the county officers were not parties to the criminal trial; they had no opportunity to litigate the Wiretap Act issue. Therefore, the Tylers may not use the earlier ruling for "offensive" purposes. Hunter v. City of Des Moines, 300 N.W.2d 121, 126 (Iowa 1981). Accordingly, the district court correctly declined to apply rules of preclusion in this case.

At the time of the events alleged in the Tylers' complaint, the Wiretap Act prohibited willful interception of "wire"

or "oral" communications. See 18 U.S.C. § 2511. Wire communications were defined as those made at least in part by communications facilities employing "wire, cable, or other like connection between the point of origin and the point of reception." Id. § 2510(1). Oral communication meant that made by "a person exhibiting an expectation that [the conversation] is not subject to interception under circumstances justifying such expectation." Id. § 2510(2).

Notwithstanding Hall, supra, the emerging view is that cordless telephone transmissions were not "wire communications" even before the 1986 amendment. See Edwards v. Bardwell, 632 F. Supp. at 589 (when either end of conversation originates or radio-telephone, conversation is "oral communication"); State v. DeLaurier, 488 A.2d 688, 693-94 (R.I. 1985); State v.

Howard, 235 Kan. 236, 247-49, 679 P.2d 197, 204-05 (1984). Hence, the Tylers' cordless communication was protected under federal law only if it qualified as an "oral communication" accompanied by justifiable expectations of privacy.

Because the expectation of privacy requirement for oral communication is drawn from Supreme Court holdings applicable to fourth amendment analysis, see Hall, 488 F.2d at 198, the test for the Tylers' constitutional claim and their Wiretap Act claim is the same. Courts have not accepted the assertions of privacy expectation by speakers who were aware that their conversation was being transmitted by cordless telephone. See Edwards v. Bardwell, 632 F. Supp. at 589 (no privacy expectation for conversation "broadcast by radio in all directions to be overheard by countless

people"); Hall, 488 F.2d at 198 (particular speakers knew they could be overheard, and thus had no justifiable expectation of privacy); see also DeLaurier, 488 A.2d at 694 (phone came with manual alerting owner that conversation could be transmitted to others); Howard, 235 Kan. at 249, 679 P.2d at 206 (same). Cf. United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970)(no expectation of privacy for conversation over mobile telephones under fourth amendment analysis), cert. denied, 400 U.S. 1000 (1971).[2/] Therefore, as a matter of federal law, we do not believe the Tylers

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[2/] We leave open whether civil actions may lie against manufacturers for failing to provide adequate warnings. We note that persons using a standard telephone to speak to a cordless telephone user are generally thought to be protected, because such a person has no reason to know his or her words are being broadcast from the cordless phone user's base unit to a handset. DeLaurier, 488 A.2d at 694 n.4; Howard, 235 Kan. at 249, 79 P.2d at 206.

had a justifiable expectation of privacy for their conversations.[3/]

The requirement of a privacy expectation also applies to claims under the Communications Act, 47 U.S.C. § 605. See Edwards v. State Farm Ins. Co., 833 F.2d 535, 539 (5th Cir. 1986); United States v. Rose, 669 F.2d 23, 26-27 (1st Cir.), cert. denied, 459 U.S. 828 (1982). Therefore, the Tylers' claim under this statute must also fail.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT

[TO BE PUBLISHED]

3/ We express no view as to whether the defendants' actions violate state law. See Iowa Code § 727.8.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2273SI

Scott C. Tyler, etc., et al,	*	
	*	Order Denying
Appellants,	*	Petition for
	*	Rehearing and
vs.	*	Suggestion for
	*	Rehearing En
Rich Berodt, et al,	*	Banc.
	*	
Appellees.	*	
	*	

Appellant's pro se petition for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of the active voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

August 8, 1989

No. 89-691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SCOTT C. TYLER, individually; SHEILA LYNN TYLER; DEBRA DENISE TYLER; JENELLE LORRAINE TYLER, by SCOTT C. TYLER, her father and next friend; BRYAN KENT TYLER, by SCOTT C. TYLER, his father and next friend,

Petitioners,

vs.

RICH BERODT; SANDRA BERODT; EVERETT HOWARD; SCOTT COUNTY, IOWA; FORREST ASHCRAFT, SCOTT COUNTY SHERIFF,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether established Fourth Amendment law fully resolves petitioners' claims of a reasonable expectation of privacy in communications broadcast from a cordless telephone unit in or near their residence to another ordinary cordless phone unit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions:

Statutes:

Legislative History:

No. 89-691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SCOTT C. TYLER, individually; SHEILA LYNN TYLER;
DEBRA DENISE TYLER; JENELLE LORRAINE TYLER,
by SCOTT C. TYLER, her father and next friend;
BRYAN KENT TYLER, by SCOTT C. TYLER,
his father and next friend,

Petitioners,

vs.

RICH BERODT; SANDRA BERODT; EVERETT HOWARD;
SCOTT COUNTY, IOWA; FORREST ASHCRAFT,
SCOTT COUNTY SHERIFF,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Proceedings Below

Respondents do not accept petitioners' Statement of the Proceedings Below. Petitioners' Statement is overly argumentative. However, respondents have elected not to recast the Statement since the Findings and Opinions of the lower courts are set forth verbatim for the Court's consideration in petitioners' appendix.

B. Factual Background

Respondents do not accept petitioners' Statement of the Facts.

The record shows that by means of their own ordinary cordless telephone, respondents Rich and Sandra Berodt overheard and recorded the conversations of Petitioner Scott C. Tyler, who was later charged with and convicted of felony theft and conspiracy on the basis of criminal activity discussed over his cordless telephone.[1]

The Berodts were able to receive the communications broadcast from petitioners' cordless telephone unit without making any modifications or additions to the technological components of their own cordless unit. To more clearly receive these communications, the Berodts merely had to unplug the base unit of their own cordless phone.[2] The owners' manual for the petitioners' cordless phone informed them that others with cordless telephones could overhear communications broadcast by the petitioners' unit, by warning them that they might overhear communications from other cordless telephones operating in the area on the same frequency. The owners manual further informed petitioners that the broadcast range of their cordless unit could exceed 700 feet, depending on local operating conditions. The only "security system" described in the petitioners' owners' manual does not state or imply that the user's calls are not subject to interception by other cordless units. According to the manual, the system only prevents other cordless units

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[1] Deposition of Sandra Berodt, October 30, 1984 at pp. 1-56, petition at pp. 9, 11, and petition appendix (hereinafter pet. app.) at p. 13.

[2] See n.1, *supra*, Berodt deposition at pp. 10-11. Furthermore, the record is bereft of any indication that law enforcement authorities played any part in the Berodts' discovery of how to more clearly receive these broadcast communications.

from transmitting to the owner's unit when it is not in use.[3] The remaining facts pertinent to this matter are set forth in the Federal District Court's 5/18/88 ruling granting respondents' Motion for Summary Judgment. (pet. app. pp. 10-14)

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals applied the well-established Fourth Amendment objectively reasonable expectation of privacy standard to petitioners' claims of privacy in communications broadcast from their cordless telephone unit to another ordinary cordless phone unit.

The question presented does not require resolution by this Court because the record amply supports the Court of Appeals' application of the facts to the objectively reasonable expectation of privacy standard.

This Court should deny the writ because petitioners have utterly failed to present any reasonable legal or public policy justification for deviating from well-established Fourth Amendment law to bestow an objectively reasonable expectation of privacy upon cordless telephone users, when users of this optional convenience have every reason to expect that such communications can be readily overheard by other individuals using commonly available, ordinary types of radio-based communications equipment.

The decisions of the Eighth Circuit Court of Appeals does not conflict with prior decisions of this Court.

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[3] See pp. 2, 4, of portions of petitioners' owners manual attached to Public Defendants' Memorandum in Support of Renewed Motion for Summary Judgment filed on or about 3/7/88.

ARGUMENT

I. THE COURT SHOULD DENY THE WRIT BECAUSE ESTABLISHED FOURTH AMENDMENT LAW FULLY RESOLVES THE PETITIONERS' REASONABLE EXPECTATION OF PRIVACY CLAIMS

Petitioners concede that the court below applied the appropriate, well-established Fourth Amendment standard to petitioners' claims of privacy in communications broadcast by their cordless telephone unit. The standard applied, whether an individual possessed a subjective and a legitimate or objectively reasonable expectation of privacy in the activity or matter in issue, is derived from *Katz v. United States,* 389 U.S. 347 (1967). *Katz* has been acknowledged as the "lodestar" of Fourth Amendment law. *Smith v. Maryland,* 442 U.S. 736, 739 (1979). See also *California v. Ciraolo,* 476 U.S. 207, 211 (1986).

The same reasonable expectation of privacy analysis is also applicable to two federal statutory claims asserted by petitioners, namely §2510(2) "oral communications" in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, et seq.; and the Communications Act of 1934, 47 U.S.C. §605.[4]

The question presented does not require resolution by this Court because the record below amply supports the Eighth Circuit's application of the facts to the well-established reasonable expectation of privacy standard. The Court of Appeals considered undisputed facts showing that all communications overheard by the respondents involved radio-wave transmissions broadcast from, and received by ordinary cordless telephone units owned by the parties, and that petitioners knew or had every reason to know their conversations could be received by any cordless unit operating on the same frequency within a distance of well over two football fields in any direction from petitioners' residence. (pet. app. pp. 11-14)

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[4] *See* cases cited in pet. app. pp. 25-27.

Aside from the facts of the pending case which document the ready ability of other, standard cordless telephone units to receive petitioners' broadcast communications, the court below also had access to the findings and opinions of a number of federal and state cases, as well as 1986 amendments to 18 U.S.C. 2510 et seq., all of which clearly demonstrate the patent ease with which radio wave telephone communications can be overheard by persons using like units or other types of ordinary communications equipment commonly used by the public.[5] See *United States v. Hoffa,* 436 F.2d 1243 (7th Cir. 1970), *cert. den.* 400 U.S. 1000 (1971); *Edwards v. Bardwell,* 632 F. Supp. 584 (M.D. La. 1986) *aff'd* 808 F.2d 54 (5th Cir. 1986); *State v. Howard,* 235 Kan. 236, 679 P.2d 197 (1984); *State v. DeLaurier,* 488 A.2d 688 (R.I. 1985); *People v. Fata,* 139 Misc.2d 979, 529 N.Y.S.2d 683 (Co. Ct. 1988); Pub. L. 99-508 §101(a)(1), (2), (12) (1986); and S. Rep. No. 99-541, 99th Cong., 2nd Sess. pp. 9, 12 (1986), reprinted in 1986 U.S. Code Cong. & Ad. News, 3563, 3566.[6]

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[5] Contrary to petitioners' assertion, they did not timely raise as disputed fact issues the capacity of ordinary communication devices to overhear cordless telephone broadcasts, and the frequency of such occurrences. See Petitioners' Brief in Support of Resistance to Motions for Summary Judgment filed 3/18/88; and Motion for Re-Argument, and for Expansion of Findings of Fact, Conclusions of Law, and Alteration or Amendment of Judgment filed on or about 7/25/88.

[6] Petitioners also claim that the 1986 amendments to 18 U.S.C. 2510, et seq. are of limited significance because they merely decriminalize the inadvertent reception of cordless telephone communications. Although the amended statute does make special provisions for the inadvertent reception of several categories of communications, this type of provision is not included in its treatment of cordless telephones. Petitioner's reference to a congressional intert to merely decriminalize the interception of cordless phone communications is also a red herring. This statute, which petitioners agree is intended to implement Fourth Amendment interests, sets the parameters for both civil and criminal liability in regard to the interception of various forms of communication. *See* Pub. L. No. 99-508 §103 (1986).

In their attempt to fashion a claim of a compelling unresolved issue of Fourth Amendment law, the petitioners seek to override the facts and findings which clearly support the decision of the court below by characterizing the cordless telephone as an essential means of modern communication. The cordless telephone is in fact merely a convenient and thoroughly optional form of communication equipment.

This Court should deny the writ because petitioners have utterly failed to present any reasonable legal or public policy justification for deviating from well-established Fourth Amendment law to bestow an objectively reasonable expectation of privacy upon cordless telephone users, when users of this optional convenience have very reason to expect that such communications can be readily overheard by other individuals using commonly available, ordinary types of radio-based communications equipment.[7]

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT

The determination by the Eight Circuit Court of Appeals that petitioners had no reasonable expectation of privacy in radio-borne communications broadcast from one ordinary cordless telephone unit to another does not conflict with prior decisions of this Court. In *Berger v. New York,* 388 U.S. 41, 58-64 (1967), this Court held that the use by law enforcement authorities of certain sophisticated surveillance devices, such as electronic "bugs" placed in homes or offices and telephone wire taps, must meet the Fourth Amendment's probable cause and warrant requirements. Given the types and intended uses of the

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[7] Petitioners' brief implies that the scope of the present case extends to the privacy interest of individuals on the land line end of a telephone communication involving a cordless phone unit. In proceedings below, the Court of Appeals for the Eighth Circuit properly noted that the issue on appeal was restricted to the privacy claims of cordless telephone users. *See* pet. app. p. 26.

electronic devices involved, the *Berger* decision assumed the question at issue in the present case, namely whether the acts of the respondents amounted to a Fourth Amendment search or seizure. The Court's decision in *Berger* simply does not address, or in any way support petitioners' contention that the broadcast and reception of radio wave communications between ordinary cordless telephone telephone units constitutes a search.

In *Lee v. Florida,* 392 U.S. 378 (1968), this Court construed the "interception" element of the Communications Act, 47 U.S.C. 605, to include at least some surveillance accomplished by means of a telephone party line. Unlike the version of §605 which controls the petitioners' claims, the formulation of §605 at issue in *Lee* did not require the claimant to demonstrate a justifiable expectation of privacy in the subject communications. See *United States v. Rose,* 669 F.2d 23, 26-27 (1st Cir. 1982), *cert. den.,* sub. nom. *United States v. Hill,* 459 U.S. 828 (1982); and *Edwards v. State Farm Ins. Company,* 833 F.2d 535 (5th Cir. 1987). Furthermore, the *Lee* Court explicitly noted that it did not decide the Fourth Amendment issues raised by the petitioner in the case. 392 U.S. at 379, n. 2.

This Court's decision in *United States v. Karo,* 468 U.S. 705 (1984), does not support petitioners' claim that the case presents an unresolved Fourth Amendment issue as a result of the fact that their cordless telephone radio wave broadcasts emanated from their residence.

In *Karo,* federal law enforcement agents arranged to surreptitiously place a location-monitoring beeper in a can of chemicals purchased by a suspected drug manufacturer. After the can of chemicals was transported to a series of locations by the suspect, it was finally moved to a private residence. The agents verifed the location of the can, and its continuing presence at the residence by means of specialized electronic equipment which tracked beeper signals. Such information, along with other facts and circumstances developed in the case,

was used by the agents in an application for a warrant to search the residence. The *Karo* Court held that the agents ran afoul of the Fourth Amendment when they used their specialized monitoring equipment to confirm that the beeper was located at the residence, and to verify that it remained there for an extended period of time, when such information could not have been accomplished by ordinary visual surveillance. 468 U.S. at 714. One of the critical facts underlying the Court's holding is the agents' placement of a monitoring device in a receptacle which in the ordinary course of events allowed them to monitor its presence in a private residence. In addition to the agents' active role in causing a monitoring device to be placed in a private residence, *Karo* is distinguishable in that the agents then used specialized electronic surveillance equipment directed specifically to the covert device to verify its presence in the residence. In the present case, the respondents in no way caused a monitoring device to be placed in the petitioners' residence, nor did they direct any specialized monitoring technology at the residence. Instead, respondents merely overheard communications broadcast from the petitioners' cordless telephone through a medium, and by a means generally available to the public. *Karo* therefore does not stand for the proposition that communications broadcast by such means over the airwaves from a residence (as opposed to an office, car or some other location), implicates any separate or additional Fourth Amendment interests.

Petitioners' invocation of Justice O'Connor's concurring opinion in *Florida v. Riley,* 488 U.S. ____, 102 L.Ed.2d 835 (1989), is equally inapplicable to the question presented. In *Riley* this Court held that no search of the curtilage of an individual's property occurred when law enforcement agents observed the property while flying over it in a helicopter under conditions equally available to civilian aircraft. Justice O'Connor's concurring opinion included dicta to the effect that an individual may have a reasonable expectation of privacy if the agents had flown over the property at an altitude at which the public rarely or never travels. 488 U.S. at ____, 102 L.Ed.2d at 845.

As applied to the facts of the pending case, this dicta poses the question of whether petitioners could reasonably expect that their broadcast communications were not readily available to other individuals using ordinary types of communication equipment. The factual record in the pending case, the findings of analogous federal and state cases, and the legislative history of pertinent federal statutes, all of which were available to the court below, are replete with information by which the Court of Appeals for the Eighth Circuit could correctly determine that petitioners had no objectively reasonable expectation of privacy in radio wave broadcasts from their cordless telephone unit, since such communications are so readily and easily received by similar, ordinary types of communications equipment.

The prior decisions of this Court cited by petitioners plainly do not conflict with the decision below.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 28, 1989